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**IN THE
COURT OF APPEALS OF INDIANA**

JORDAN M. WOODWARD,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 08A05-0612-CR-702

APPEAL FROM THE CARROLL CIRCUIT COURT
The Honorable Donald E. Currie, Judge
Cause No. 08C01-0508-FA-10

October 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Jordan M. Woodward appeals his conviction for Child Molesting,¹ a class A felony. Woodward argues that his conviction must be reversed because it is possible that the jury's verdict was not unanimous. Finding no error, we affirm the judgment of the trial court.

FACTS

In April 2004, Karen Harness was involved in a car accident and broke her back. Harness's daughter, K.H., was twelve years old at the time. Woodward, who had known Harness and K.H. for eight years, began visiting Harness's home "almost every night . . . or several nights a week at least" to help her with errands. Tr. p. 29. Harness began to notice that K.H. had a "crush" on Woodward and knew that K.H. had "liked him even from the time she was little." Id. at 36-37.

In January 2005, K.H.'s feelings toward Woodward intensified and she began "liking him more." Id. at 136. Harness noticed that her daughter was spending a lot of time with Woodward and she became suspicious of their relationship. In May 2005, Harness searched K.H.'s purse and found a letter from Woodward expressing his feelings for K.H. Woodward wrote that he was "really glad that [he and K.H. were] officially back together" and that he was "still very confused as to how [he] fell in love with [K.H.]" Ex. 4. Infuriated, Harness confronted Woodward about the letter and asked him if he was having sex with her daughter. Woodward admitted that he wrote the letter but denied having sex with K.H.

¹ Ind. Code § 35-42-4-3(a)(1).

Harness confronted her daughter and instructed her to stay away from Woodward. Nevertheless, K.H. continued to call Woodward at work every day. K.H. and Woodward met in person on June 26, 2005, and were intimate.

In August, K.H. went to Florida to visit her father. During that trip, K.H. told her father's girlfriend, Kathleen Johnson, about her relationship with Woodward. K.H. told Johnson that she and Woodward had had sex on June 26, 2005.

On August 17, 2005, the State charged Woodward with four counts of class A felony child molesting. Count I alleged that Woodward had sexual intercourse with K.H. on June 26, 2005. Counts II-IV contained identical language and alleged that Woodward committed deviate sexual conduct with K.H. between April 1, 2005, and June 26, 2005.

A three-day jury trial began on September 18, 2006. The jury acquitted Woodward of the first three counts but found him guilty of Count IV, class A felony child molesting. A sentencing hearing was held on November 8, 2006, and the trial court sentenced Woodward to twenty-three years imprisonment with three years suspended to probation. Woodward now appeals.

DISCUSSION AND DECISION

Woodward argues that his conviction is improper because it is possible that the jury's decision was not unanimous. Woodward speculates that the jurors may have relied on different evidence to convict him.

To preserve this issue for appeal, it was necessary for Woodward to object to either the verdict forms or the verdict at trial. Scuro v. State, 849 N.E.2d 682, 687-88 (Ind. Ct.

App. 2006), trans. denied. Here, however, after the jury returned the verdict and was polled, the trial court asked Woodward and his attorney whether there was any reason that judgment could not be pronounced and neither Woodward nor his counsel specifically objected. Therefore, Woodward has waived this argument on appeal.

To overcome waiver, Woodward must show fundamental error. The fundamental error exception is extremely narrow and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. Mathews v. State, 849 N.E.2d 578, 587 (Ind. 2006).

Woodward likens his case to two previous cases in which our court has reversed a defendant's conviction because of the possibility that the jury did not return a unanimous verdict. In Castillo v. State, the State charged the defendant with one count of dealing in cocaine but presented evidence at trial of two separate instances of Castillo's alleged drug dealing. 734 N.E.2d 299, 304 (Ind. Ct. App. 2000). Because the State chose to charge Castillo with one act of dealing in cocaine even though there was evidence that Castillo committed two separate acts of dealing in cocaine, we concluded that

[i]t is possible, given these facts, that some jurors believed that Castillo committed the earlier dealing crime at Garcia's home while other jurors believed that Castillo committed the dealing violation at his home later that same day. Consequently, it is possible that the jury's verdict of guilty regarding the charge of dealing in cocaine was not unanimous.

Id. at 304-05. Thus, we vacated Castillo's conviction.

In Scuro, the defendant was charged with three counts of class D felony dissemination of matter harmful to minors. The three charges were based on one incident where Scuro showed pornographic material to three boys simultaneously. 849 N.E.2d at 685-86. After interpreting the dissemination statute, we vacated two of Scuro's convictions on double jeopardy grounds. Id. at 687. Scuro also argued that the holding in Castillo barred his remaining conviction. In addressing that issue, we noted that one of the victims, D.D., testified at trial that Scuro had shown him pornographic material when the other boys were present and, on a separate occasion, when he was alone with Scuro. Applying the holding in Castillo, we held that

because the State did not charge Scuro separately for the incidents involving only D.D., we simply do not know whether the jury convicted Scuro for dissemination to D.D. based on the incidents involving only him or the incident involving all three victims. Had the State been more specific in the charging information, this would not be an issue. But given that Scuro was charged with only one count of dissemination to D.D. based on an unspecified incident, and given that the State presented evidence of three instances of dissemination to D.D., it is possible that the jury's verdict on Count V was not unanimous. Thus, Scuro's conviction for dissemination to D.D. must be vacated.

Id. at 688-89.

Here, Woodward was charged with four counts of class A felony child molesting. Count I alleged that Woodward had sexual intercourse with K.H. on June 26, 2005. Counts II-IV contained identical language and alleged that Woodward committed deviate sexual conduct with K.H. between April 1, 2005, and June 26, 2005.

At trial, K.H. testified that she and Woodward had sex on June 26, 2005. Tr. p. 159, 169. K.H. also testified that Woodward performed oral sex on her at various times during

their relationship. She testified that Woodward first performed oral sex on her at his house after she finished swim practice sometime before February 2005. Id. at 194. K.H. did not remember the exact date of the incident. K.H. testified that she didn't know when the second incident of oral sex was but that it happened at Woodward's house after she was diagnosed with mononucleosis in February 2005. Id. at 198, 200. K.H. ultimately testified that Woodward performed oral sex on her four times, "twice at [Harness's] house and twice at [Woodward's] house" and that the "third time was at [her] house." Id. at 200, 201. She testified that the final encounter occurred on June 26, 2005. Id. at 203-04.

At the end of the evidence, the trial court instructed the jury that "[t]o return a verdict, each of you must agree to it." Appellant's App. p. 478. The jury acquitted Woodward of the first three counts but convicted him of Count IV. While we encourage the State to file more specific charges that clearly distinguish which charge relates to which incident, it is clear from the record that Charge IV was based on the final time Woodward performed oral sex on K.H. K.H. unequivocally testified that Woodward performed oral sex on her for the final time on June 26, 2005. Id. at 203-04. And during closing arguments, Woodward's counsel argued that K.H. was "[p]retty clear that the fourth one was at her house." Id. at 402 (emphasis added). Based on this evidence, we find that it was clear to the State, Woodward, and the jury that Count IV referred to the final sexual encounter between K.H. and Woodward on June 26, 2005. Because there is no possibility that the jury's verdict was not unanimous, Woodward has not shown fundamental error and his argument fails.

The judgment of the trial court is affirmed.

SHARPNACK, J., and RILEY, J., concur.